

August 27, 1996

MEMORANDUM

SUBJECT: Extension of January 25, 1995 Potential to Emit
Transition Policy

FROM: John S. Seitz, Director
Office of Air Quality Planning and Standards (MD-10)

Robert I. Van Heuvelen, Director
Office of Regulatory Enforcement (2241A)

TO: See Addressees

This memorandum extends the Environmental Protection Agency's (EPA) January 25, 1995, transition policy for potential to emit (PTE) limits relative to maximum achievable control technology (MACT) standards issued under section 112 of the Clean Air Act. In addition, this memorandum discusses the implications of a recent court decision relative to the title V operating permits program.

Background

Many MACT standards apply only to major sources, that is, those with a PTE greater than a given level. A source's PTE, that is, the amount the source could possibly emit, is affected by its maximum physical capacity to operate and emit and by enforceable limits. The current definition of PTE for the MACT program, which is contained in 40 CFR part 63, subpart A, requires that limits affecting a source's PTE must be enforceable by the EPA and citizens in order to be taken into account in the PTE calculation. These regulations are currently under review, and the EPA is engaged in a rulemaking process to amend the current requirements. The EPA is currently reviewing information resulting from a stakeholder process that was designed to explore options related to this rulemaking. Further information on options being considered is contained in Attachment 1, which is a stakeholder discussion paper of January 31, 1996.

The Current Transition Policy

In a policy memorandum of January 25, 1995, the EPA announced a transition policy. This transition policy was to alleviate concerns that sources may face gaps in the ability to acquire federally-enforceable PTE limits because of delays in State adoption or EPA approval of programs or in their implementation. In order to ensure that such gaps would not create adverse consequences for States or for sources, the EPA provided that for a 2-year period extending from January 1995 to January 1997 (for sources lacking federally-enforceable limitations), State and local air regulators have the option of treating the following types of sources as non-major:

(1) sources who maintain adequate records to demonstrate that actual emissions are less than 50 percent of the major source threshold, and

(2) sources emitting between 50-100 percent of the threshold, but holding State-enforceable limits that are enforceable as a practical matter.

The National Mining Decision

In the National Mining court decision (National Mining Association v. EPA, 59 F.3d 1351 (D.C. Cir. 1995)), the court addressed hazardous air pollutant programs under section 112. The court found that EPA had not adequately explained why only federally-enforceable measures should be considered as limits on a source's PTE. Accordingly, the court remanded the section 112 General Provisions regulation (40 CFR part 63, subpart A) to EPA for further proceedings. Notably, in National Mining the court required the EPA to reconsider the Federal enforceability requirement, but did not vacate the requirement. As a result, the requirement for Federal enforceability is still in effect.

Extension of Transition Policy

It is unlikely at this time that on-going efforts to amend the PTE requirements in the MACT standard General Provisions, to address the National Mining decision, will be completed before January 1997. These rule amendments will affect any Federal enforceability requirements that may apply in the future for PTE limits under the MACT program. As a result, it is likely that after January 25, 1997, there will continue to be uncertainty with respect to the Federal enforceability of limits, and thus the basis for the January 25, 1995, transition policy will

continue to be valid. The EPA is, therefore, extending the transition period for the MACT program for an additional 18-month period (January 25, 1997 to July 31, 1998).

Implications of Recent Court Decision for the Title V Program

In Clean Air Implementation Project vs. EPA, No. 96-1224 (D.C. Cir. June 28, 1996), the court remanded and vacated the requirement for Federal enforceability for PTE limits under part 70. Because the court vacated this requirement, the term "federally enforceable" in section 70.2 should now be read to mean "federally enforceable or legally and practicably enforceable by a State or local air pollution control agency" pending any additional rulemaking by the EPA.

The EPA interprets the court order vacating the part 70 definition as not affecting any requirement for Federal enforceability in existing State rules and programs, that is, whether Federal enforceability is required as a matter of State law. Pending the outcome of the current rulemaking effort, the EPA believes that States are not likely to pursue submittals for program revisions. There may, therefore, be States wishing to continue to observe the transition policy. Accordingly, the EPA is extending the transition policy as it relates to title V permitting for an additional 18 months (January 25, 1997 through July 31, 1998).

Implications for New Source Review

Neither the January 25, 1995, transition policy, the National Mining Association court decision, nor the Clean Air Implementation Project court decision impact the New Source Review (NSR) and prevention of significant deterioration (PSD) programs. The EPA's current policy with respect to PTE issues related to the NSR and PSD programs remains as described in the January 22, 1996, policy memorandum, "Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit," which is included as Attachment 2.

Distribution/Further Information

We are asking Regional Offices to send this memorandum to States within their jurisdiction. Questions concerning specific issues and cases should be directed to the appropriate Regional Office. The Regional Office staff may contact Timothy Smith of the Integrated Implementation Group at 919-541-4718; Adan Schwartz of the Office of General Counsel at 202-260-7632; or Charlie Garlow of the Office of Regulatory Enforcement at 202-564-1088. The document is also available on the technology

transfer network (TTN) bulletin board, under "Clean Air Act, Title V, Policy Guidance Memos." (Readers unfamiliar with this bulletin board may obtain access by calling the TTN help line at 919-541-5384).

Attachments

Addressees:

Director, Office of Ecosystem Protection, Region I
 Director, Division of Environmental Planning and Protection,
 Region II
 Director, Air, Radiation, and Toxics Division, Region III
 Director, Air, Pesticides, and Toxics Management Division, Region IV
 Director, Air and Radiation Division, Region V
 Director, Multimedia Planning and Permitting Division, Region VI
 Director, Air, RCRA, and TSCA Division, Region VII
 Assistant Regional Administrator, Office of Pollution Prevention,
 State, and Tribal Assistance, Region VIII
 Director, Air and Toxics Division, Region IX
 Director, Office of Air, Region X
 Regional Counsels, Regions I-X
 Director, Office of Environmental Stewardship, Region I
 Director, Division of Enforcement and Compliance Assurance,
 Region II
 Director, Enforcement Coordination Office, Region III
 Director, Compliance Assurance and Enforcement Division, Region VI
 Director, Enforcement Coordination Office, Region VII
 Assistant Regional Administrator, Office of Enforcement, Compliance
 and Environmental Justice, Region VIII
 Enforcement Coordinator, Office of Regional Enforcement
 Coordination, Region IX

cc: C. Garlow, 2242A
 J. Ketcham-Colwill, 6103
 A. Schwartz, 2344
 T. Smith, MD-12